



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 13, 2002

Ms. Stephanie Bergeron  
Director, Environmental Law Division  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087

OR2002-7140

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173649.

The Texas Commission on Environmental Quality (the "commission") received a request for copies of documents filed by Continental Carbon Company ("Continental") after a specified period of time concerning particular permits. You take no position regarding the requested information but have notified Continental of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). Continental asserts that portions of the requested information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered all claimed exceptions to disclosure and reviewed the submitted representative sample documents.<sup>1</sup>

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the

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<sup>1</sup> We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information was obtained. *See* Gov't Code § 552.110(a)-(b). Under section 757 of the Restatement of Torts, a "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . *A trade secret is a process or device for continuous use in the operation of the business.* Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The following six factors are relevant to the determination of whether information qualifies as a trade secret under section 757 of the Restatement of Torts:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision No. 232 (1979).

Section 552.110(b) of the Government Code excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); see also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

As support for its position, Continental has submitted an affidavit from its corporate director for Safety, Health, and Environmental Affairs (the “director”). In the affidavit, the director describes the various trade secret factors that apply to portions of the submitted information. He also identifies other commercial and financial information and explains how its release could potentially cause Continental substantial competitive harm. Having reviewed Continental’s arguments, the submitted affidavit, and the information at issue, we conclude that Continental has established a *prima facie* case that portions of the information qualify as Continental’s trade secret information under section 552.110(a) and has demonstrated the applicability of section 552.110(b) to other portions of the information. We note that we have received no arguments that rebut Continental’s trade secret position as a matter of law and find that Continental has demonstrated that release of the commercial and financial information would cause it substantial competitive harm. Accordingly, we conclude that the commission must withhold those portions of the information at issue that Continental has marked pursuant to section 552.110 of the Government Code.

We note, however, that the information at issue contains information relating to emissions. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. See 42 U.S.C. § 7414(c). Thus,

to the extent that the marked information constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information in accordance with the federal law.

We note that certain e-mail addresses contained within the remaining information at issue are subject to section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the commission to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the commission, unless the members of the public have affirmatively consented to their release. As there is no indication that the member of the public has consented to release of the e-mail address that we have marked, pursuant to section 552.137 of the Government Code, the commission must withhold this e-mail address.

We note that portions of the remaining submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the commission must withhold the information that we have marked pursuant to section 552.110 of the Government Code unless it is subject to release under federal law as emissions data. The marked e-mail address must also be withheld under section 552.137 of the Government Code. The commission must release the remaining submitted

information to the requestor; however, in doing so, the commission must comply with copyright law.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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<sup>2</sup> Because we base our ruling on sections 552.110 and 552.137 of the Government Code, we need not address the applicability of Continental's remaining arguments with respect to the information at issue.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive, slightly stylized font.

Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 173649

Enc. Marked documents

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